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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL VASQUEZ CERVANTES, Defendant and Appellant.	D052065 (Super. Ct. No. JCF18197)

APPEAL from a judgment of the Superior Court of Imperial County, Juan Ulloa, Judge. Reversed.

Defendant Gabriel Vasquez Cervantes pled no contest to false imprisonment of his estranged wife. (Pen. Code, § 236.)[1] Cervantes was to receive a sentence of probation for a period of three years in exchange for the plea. Cervantes failed to appear at his sentencing hearing., When Cervantes ultimately did appear in court, the trial court refused to accept the previously agreed upon disposition. The court denied Cervantes's

1 Undesignated statutory references are to the Penal Code.

request to withdraw his plea and sentenced him to the upper term of three years in state prison.

Cervantes appeals, arguing: (1) the court erred in denying his request to withdraw his no contest plea; and (2) imposition of the upper term violated *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*). We reject the People's claim that Cervantes's failure to obtain a certificate of probable cause bars consideration of these issues on appeal and conclude that the trial court's failure to comply with section 1192.5 requires reversal. To forestall a second appeal in the event Cervantes elects not to withdraw his plea on remand, we consider and reject Cervantes's argument that the court committed *Cunningham* error in sentencing him to the upper term.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Cervantes and the victim were married for 25 years, but separated a year before the incident giving rise to the charge in this case. On June 12, 2006, the victim asked Cervantes for a divorce and confirmed that she had a boyfriend. The following day, Cervantes drove the victim to his employer's office to sign his retirement papers. Instead of taking the victim home, Cervantes threatened to kill himself and drove with the victim onto Interstate 8. He eventually stopped the car on a dirt road, pulled out a knife, and said to the victim, "Before I kill myself, you are going to make love to me." Cervantes and the victim had sexual intercourse behind some haystacks. The victim reported the incident to the Imperial County Sheriff's Office, and Cervantes was subsequently

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2 The facts regarding the charged offense are taken from the first probation report.

arrested. While booking Cervantes, the officers found an empty knife pouch in his possession.

The district attorney charged Cervantes with a single count of false imprisonment in case No. JCF18197. The plea agreement, executed on January 8, 2007, provided that Cervantes would plead no contest to the charged offense in return for: (1) a suspended sentence; (2) 60 days of jail time as a condition of probation; (3) three years of formal probation; and (4) dismissal of case Nos. ECM22392 and JCF18336, two other cases that were apparently pending against him at the time. Cervantes also agreed to stay away from the victim. The plea agreement did not include a *Cruz* waiver, which "gives a trial court the power to 'withdraw its approval of the defendant's plea and impose a sentence in excess of the bargained-for term,' if the defendant willfully fails to appear for sentencing." (*People v. Puente* (2008) 165 Cal.App.4th 1143, 1146, fn. 3, quoting *People v. Cruz* (1988) 44 Cal.3d 1247, 1254, fn 5.)

Cervantes failed to appear at sentencing on February 20, 2007, and the court issued a bench warrant. The court remanded Cervantes to custody when he appeared in court four months later. The trial court continued the sentencing hearing numerous times amid discussions of the other pending cases, the status of the plea agreement, and the need for a supplemental probation report. At a hearing on August 20, 2007, defense counsel acknowledged that Cervantes faced "some other serious charges" in case Nos. JCF20247 (§§ 236, 273.5, subd. (a) & 242/243, subd. (a)) and CCM17787 (Health & Saf. Code, §§ 11377, subd. (a) & 11364), pending cases that were cited in the first probation report. The deputy district attorney agreed with the probation department that the court

should reject the plea agreement and sentence Cervantes to the middle term of two years in prison. When defense counsel indicated that the victim had recanted in a written statement, the court responded, "[I]f the victim recanted, [Cervantes] should withdraw his plea. If we're going to go forward on the plea, he doesn't get the original deal, because he blew that up." The court informed the parties that it intended to deny probation and commit Cervantes to prison for the two-year middle term.

At the October 23, 2007 sentencing hearing, the court denied Cervantes's motion to withdraw his no contest plea. The court observed that Cervantes "failed to cooperate on the original sentencing report[,] failed to report to probation as directed by the court[,] failed to report to the court for sentencing," and noted that it was "only a new offense which was committed while he was on probation pending sentence . . . that brought him back to court." The court sentenced Cervantes to the upper term of three years, giving the following reasons for its ruling: (1) Cervantes failed to appear, and failed to comply with the court's orders to cooperate; (2) he was on probation at the time he committed the offense at issue; (3) he showed no remorse; and (4) he was "likely to be a danger to the same persons or other persons . . . ." Cervantes then pled no contest to battery in case No. JCF20247 and the court sentenced him to 180 days in jail, to run concurrently with the state prison sentence. The court dismissed case No. CCM17787.

Defense counsel filed a notice of appeal on behalf of Cervantes on November 16, 2007. On the attached request for a certificate of probable cause, counsel listed several possible grounds in support of the request. The request appeared to be directed to appellate counsel, not to the court.

The court did not act on the equivocal request within the period required by California Rules of Court, rule 8.304(b)(2). This court denied Cervantes's August 12, 2008, motion to amend the notice of appeal to add an explicit request for a certificate of probable cause, and denied his alternative request that we issue a writ of mandate directing the trial court to grant or consider Cervantes's new request for a certificate of probable cause.

DISCUSSION

I

Cervantes Was Not Required To Obtain a Certificate of Probable Cause to Appeal the Trial Court's Denial of His Motion To Withdraw His Plea of No Contest

The People contend that Cervantes's appeal is barred by his failure to obtain a certificate of probable cause, which, the People maintain, is required under section 1237.5. Although the Supreme Court has stressed the need for strict enforcement of section 1237.5 and the related rules of court (*People v. Mendez* (1999) 19 Cal.4th 1084, 1097-1098 (*Mendez*)), we conclude that Cervantes's challenge to the trial court's denial of his motion to withdraw the plea under section 1192.5[3] falls within a recognized exception to the statute's requirements.

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3 Section 1192.5 reads in relevant part: "Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea. [¶] . . . [¶] If the plea is not accepted by the prosecuting attorney and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter the plea or pleas as would otherwise have been available."

Section 1237.5 limits the grounds for appeal following judgments on pleas of no contest. That section sets out additional procedural steps that a defendant must take before appealing from a judgment following a plea of no contest. These procedural requirements are intended to screen out frivolous appeals. (*In re Chavez* (2003) 30 Cal.4th 643, 650-651 (*Chavez*).) The statute provides: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of . . . nolo contendere, . . . except where both of the following are met: (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶](b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court." (§ 1237.5.) The notice of appeal and attached statement of grounds for certificate of probable cause must be filed within 60 days after judgment. (Cal. Rules of Court, rule 8.308(a); see *Mendez, supra,* 19 Cal.4th at p. 1095.) If defendant fails to comply with the requirements of section 1237.5, the Court of Appeal " 'generally may not proceed to the merits of the appeal, but must order dismissal . . . .' [Citations.]" (*Chavez*, at p. 651.) Cervantes does not dispute that he failed to obtain a certificate of probable cause.

There are two well-recognized exceptions to the broad language of Penal Code section 1237.5. No certificate of probable cause is required to appeal: "(1) search and seizure issues for which an appeal is provided under section 1538.5, subdivision (m); and (2) issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed." (*People v. Panizzon*

(1996) 13 Cal.4th 68, 74 (*Panizzon*); see also Cal. Rules of Court, rule 8.304(b)(4).) The question before us is whether Cervantes's challenge to the trial court's denial of his motion to withdraw his no contest plea is an issue concerning the validity of the plea, which would require a certificate of probable cause, or a separate issue arising subsequent to the plea, which would not.

In determining whether a certificate of probable cause is required, courts look to the substance of the appeal. " '[T]he crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made.' [Citation.] Hence, the critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5. [Citation.]" (*Panizzon, supra,* 13 Cal.4th at p. 76.)

The People cite no authority to support their contention that Cervantes was required to obtain a certificate of probable cause before seeking review of the trial court's denial of a motion to withdraw his no contest plea under section 1192.5. Section 1192.5 addresses the situation where—for any number of reasons—the court withholds its approval of an otherwise valid plea agreement. The Supreme Court held in *People v. Delles* (1968) 69 Cal.2d 906, 909 (*Delles*), that no certificate of probable cause is required in this circumstance. (See also, *People v. Preciado* (1978) 78 Cal.App.3d 144, 147-148 [trial court inadvertently violated the single condition defendant added to the plea agreement].) In *Delles*, the defendant pled guilty to a single count of marijuana possession in return for a sentence of probation, conditioned on his serving four months in jail. Between the hearing at which the court granted probation and temporarily stayed

the jail sentence, and execution of the jail sentence, the defendant was arrested for allegedly selling marijuana. The court denied the defendant's motion to withdraw his guilty plea, revoked probation, and sentenced the defendant to state prison. (*Delles*, at p. 908.) The defendant sought review of the trial court's denial of his motion to withdraw his guilty plea pursuant to section 1018.[4] (*Id*. at p. 910.)

The *Delles* court held that section 1237.5 did not apply because defendant "[did] not contend that his guilty plea was invalid. Rather, he [argued] that in view of the bargain by which the guilty plea was obtained the court erred in imposing a prison sentence after revoking the order granting probation." (*Delles, supra*, 69 Cal.2d at p. 909.) In *Delles*, as here, the events that led to the trial court's revocation or rejection of probation and its denial of the defendants' motions to withdraw their pleas occurred after the pleas were negotiated. (*Id*. at p. 911.) In this case, Cervantes simply sought the remedy afforded by section 1192.5 following the court's rejection of the otherwise valid plea bargain.

The People offer no argument in opposition to the merits of defendant's section 1192.5 claim. Instead, they argue that in the event no certificate of probable cause was required and the section 1192.5 issue is properly before this court, the parties must be returned to the status quo before they negotiated the plea agreement. We agree. "The

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4 In 1968, section 1018 read in part: ". . . On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty be substituted." (Stats. 1951, ch. 858, § 1, p. 2369.)

preferred remedy in [this] context is to permit a defendant to withdraw his plea and to restore the proceedings to the original status quo." (*People v. Kaanehe* (1977) 19 Cal.3d 1, 13-14.) Accordingly, we reverse to permit Cervantes to withdraw his no contest plea.

II

The Trial Court Did Not Err in Imposing the Upper Term Based on the Aggravating Circumstance That Cervantes Was on Misdemeanor Probation at the Time of the Offense

Because Cervantes may elect not to withdraw his no contest plea on remand, we address his *Cunningham* claim, to forestall a second appeal. We reject the People's argument that Cervantes's failure to obtain a certificate of probable cause bars consideration of this issue. (*People v. French* (2008) 43 Cal.4th 36, 44-45.)

Cervantes maintains that the trial court violated his Sixth Amendment right to jury trial by sentencing him to the upper term of three years based on facts not submitted to a jury and found true beyond a reasonable doubt. He argues that all but one of the aggravating circumstances that the court cited in sentencing him to the upper term "run afoul of *Cunningham*" under *People v. Towne* (2008) 44 Cal.4th 63, 82-83 (*Towne*). As to the circumstance that "he was on probation," Cervantes's argues in his opening brief that was he was not on misdemeanor probation at the time of his plea, and in any event, his performance on probation did not constitute an exception to *Cunningham*. Cervantes concedes in his reply brief that he was in fact on summary misdemeanor probation at the time he committed the underlying offense in this case, but contends that "misdemeanor probation is not within the ambit of *Cunningham*." We conclude that this argument is without merit.

In *Towne*, the court held that the trial judge, rather than the jury, may decide the question whether a defendant was on probation or parole at the time the charged crime was committed. (*Towne, supra*, 44 Cal.4th at pp. 70-71.) The *Towne* court reasoned that the fact that a defendant was on probation is an aggravating circumstance that falls under the "fact of a prior conviction" exception to *Cunningham, supra,* 549 U.S. at pages 274-275, *Blakely v. Washington* (2004) 542 U.S. 296, 301(*Blakely*), and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 499 (*Apprendi*). (*Towne*, at pp. 77-82.) The common denominator between the fact of probation and the fact of a prior conviction is recidivism, the "tendency to relapse into a previous condition or mode of behavior" especially "criminal behavior." (Merriam-Webster's Collegiate Dict. (11th ed. 2007) p. 1038, col. 2.) The *Towne* court cited three factors described in *Apprendi, supra,* 530 U.S. at pages 487-488, that distinguish recidivism from other matters that trial courts use to enhance punishment: " '(1) recidivism traditionally has been used by sentencing courts to increase the length of an offender's sentence, (2) recidivism does not relate to the commission of the charged offense, and (3) prior convictions result from proceedings that include substantial protections.' " (*Towne*, at p. 80.) With respect to the third distinguishing factor, the *Towne* court observed that "the circumstance of a prior prison term or of probation or parole status ordinarily is well documented in the same type of official records used to establish the fact and nature of a prior conviction—court records, prison records, or criminal history records maintained by law enforcement agencies." (*Id*. at p. 81, fns. omitted.) Based on these considerations, the *Towne* court concluded that "[w]hen a defendant's prior unsatisfactory performance on probation or parole is

established by his or her record of prior convictions, it seems beyond debate that the aggravating circumstance is included within the [fact of a prior conviction] exception and that the right to a jury trial does not apply." (*Id.* at p. 82.)

In claiming *Cunningham* error, Cervantes relies on language in *Towne* that limits application of the recidivism exception and retains the right to jury trial where "a finding of poor performance on probation or parole can be established only by facts other than the defendant's prior *convictions* . . . ." (*Towne, supra,* 144 Cal.4th at p. 82.) Cervantes's reliance is misplaced because the fact that he was on misdemeanor probation at the time he committed the charged offense was documented in the probation report.

Cervantes also argues, without citation to authority, that there is a distinction between felony and misdemeanor probation for purposes of applying the recidivism exception established by the *Apprendi*/*Blakely*/*Cunningham* line of cases. We see no principled way to distinguish between felony and misdemeanor probation under the three factors that the courts in *Towne* and *Apprendi* used to identify aggravating circumstances that relate to recidivism. (*Towne, supra,* 44 Cal.4th at p. 80; *Apprendi, supra,* 530 U.S. at pp. 487-488.) The question is not the seriousness of the offense for which the defendant received probation, but instead, the fact that the defendant was *on probation*, regardless of whether the underlying offense was a felony or misdemeanor. This fact speaks to the defendant's "tendency to relapse into a previous condition or mode of . . . criminal behavior." (Merriam-Webster's Collegiate Dict., *supra,* p. 1038, col. 2.) Accordingly, we conclude that there is no legal impediment to the trial court enhancing Cervantes's sentence based on the fact that Cervantes was on misdemeanor probation at the time he

committed the charged offense. This single aggravating circumstance was sufficient to support imposition of the upper term sentence in this case. (*Towne*, at p. 75.) Although we may not have chosen to impose the upper term based on the single circumstance relating to misdemeanor probation, the trial court acted within its sentencing discretion and did not violate *Cunningham* in imposing the upper term.

DISPOSITION

The judgment is reversed and the case is remanded. The trial court is directed to vacate Cervantes's plea of no contest if he elects to withdraw that plea by an appropriate motion filed within 30 days after the remittitur issues. If Cervantes elects not to withdraw his plea within that time period, the court is directed to reinstate the original judgment.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.